

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION  
450 N STREET  
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

MAY 17, 2006

J2 REQUEST FOR CONCEPT APPROVAL  
RULES OF PRACTICE  
CHAPTER 4, APPEALS FROM ACTIONS  
OF THE FRANCHISE TAX BOARD

Reported by: Juli Price Jackson  
No. CSR 5214

P R E S E N T

For the Board  
of Equalization:

John Chiang  
Chairman

Claude Parrish  
Vice-Chair

Bill Leonard  
Member

Betty T. Yee  
Acting Member

Marcy Jo Mandel  
Appearing for Steve  
Westly, State Controller  
(per Government Code  
Section 7.9)

Gary Evans  
Acting Chief, Board  
Proceedings Division

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SPEAKERS

Name

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KENNETH DAVIS, FTB

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1 450 N STREET  
2 SACRAMENTO, CALIFORNIA  
3 MAY 17, 2006

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5 MR. EVANS: Next item is J2, request for  
6 concept approval for new Rules of Practice, Chapter 4,  
7 Appeals from actions of the Franchise Tax Board.

8 Miss Cazadd will make the presentation.

9 And we have FTB representatives to also make  
10 comments.

11 MS. CAZADD: Mr. Chairman, Members of the  
12 Board, also presented for your approval this afternoon  
13 is a concepts -- major concepts described in Chapter 4,  
14 the Appeals from the Actions of the Franchise Tax Board  
15 in the new Rules of Practice.

16 We have had several interested parties meeting.  
17 The major issues have all been resolved, however, there  
18 are -- this is concept approval again, and there are  
19 comments.

20 I understand we have two guests from the  
21 Franchise Tax Board so I'd certainly like to defer to  
22 them.

23 ---o0o---

24 KENNETH DAVIS

25 ---o0o---

26 MR. DAVIS: Good afternoon, Mr. Chairman and  
27 Board Members.

28 My name is Kenneth Davis. I'm Senior Tax

1 Counsel for the Franchise Tax Board.

2 With me today is Susan Boardman, who is Manager  
3 of our Administrative Proceedings Section.

4 We're here to answer any questions you might  
5 have, at least on behalf of the Franchise Tax Board,  
6 related to Chapter 4. And Franchise Tax Board staff  
7 recognizes and appreciates the extensive effort  
8 undertaken by Board of Equalization staff to develop the  
9 new regulations related to Chapter 4 dealing with the  
10 Appeals of the Franchise Tax Board matters.

11 Board staff received our input, as well as  
12 input from other interested parties, and worked on a  
13 collaborative basis to create regulations which would  
14 benefit efficient tax administration by this Board,  
15 addressed concerns raised by the Franchise Tax Board and  
16 also assists taxpayers.

17 We recognize that Board staff seeks in concept  
18 approval today of Chapter 4. Franchise Tax Board staff  
19 has no objection to the broad concepts that are raised  
20 in the Chief Counsel's memo.

21 We'll continue to work with Board staff on the  
22 language issues related to these concepts.

23 And, as I mentioned before, we're here today  
24 just to answer any questions you might have related  
25 to -- to Chapter 4.

26 Thank you.

27 MS. MANDEL: As long as you're there, I have a  
28 question for FTB because I did place a call,

1 unfortunately not to you, and perhaps I misunderstood  
2 what I was told since -- on the jurisdictional issues,  
3 my reading of this is that there would be no bifurcated  
4 proceedings, even where there is a genuine issue as to  
5 jurisdiction.

6 What I read staff that there would be no  
7 bifurcation, correct?

8 MR. FOSTER: Correct.

9 MS. MANDEL: Is that correct? Okay.

10 And I thought that yesterday -- and, of course,  
11 since I didn't talk to you, I talked to someone else,  
12 that my understanding was that there was concern from  
13 FTB about bifurcation, but now having -- that there be  
14 bifurcation.

15 And so I kind of thought before I read the  
16 staff memo that there would be bifurcation on those  
17 genuine issues, but there's not.

18 And you're okay with that, right?

19 MR. DAVIS: Yes, and I can speak to that for --

20 MS. MANDEL: Well, I just need you to say  
21 you're okay with it and then that washes out the answer  
22 I got yesterday because you're the man in charge on  
23 this, right?

24 MR. DAVIS: Yes.

25 MS. MANDEL: Okay.

26 MR. DAVIS: But I do want to explain, and that  
27 is, Franchise Tax Board staff did raise the bifurcation  
28 issue because we felt that raising a jurisdictional

1 issue first would be helpful to efficient tax  
2 administration.

3 Board of Equalization staff heard our concerns  
4 and they came up with a new proposal and a new concept  
5 and that is that jurisdictional issues would be heard  
6 first by the Chief Counsel.

7 And the Chief Counsel would hear those -- that  
8 bifurcation issue and seek any additional information  
9 from the parties to help determine whether a  
10 jurisdictional issue actually is raised and, if  
11 appropriate, would go before the Board.

12 So, we're satisfied with the concept.

13 MS. MANDEL: It's that last point, "if  
14 appropriate, would go before the Board."

15 MR. DAVIS: Yes?

16 MS. MANDEL: My reading -- and, of course, we  
17 don't have the language, but my reading of the memo was  
18 that once the Chief Counsel does that preliminary  
19 examination and says, "Aha, there is a real issue to go  
20 before the Board," that it was not going to go before  
21 the Board at that time just on jurisdiction, but would  
22 go as a package with the substantive tax issues in the  
23 case.

24 MR. DAVIS: And that is correct.

25 MS. MANDEL: Okay, you're okay with that.

26 MR. DAVIS: We're comfortable with that  
27 concept.

28 MS. MANDEL: Cool. Thank you.

1 MR. CHIANG: Okay.

2 MS. MANDEL: I could go on with staff on the --

3 MR. PARRISH: Let me go on a little bit.

4 MS. MANDEL: Go ahead.

5 MR. CHIANG: Please.

6 MR. PARRISH: Okay. Here's the deal here, I  
7 have to be against this and I'm going to tell you why.

8 It says a simplified briefing schedule would  
9 limit the FTB to a single response, applicable primarily  
10 to personal income taxes -- tax cases for amounts less  
11 than \$15,000.

12 What this translation is that people under  
13 \$15,000, if they go through this, they won't be able to  
14 come to the elected representatives and those are  
15 exactly the people that should come before the elected  
16 representatives and have their day before the elected  
17 representatives.

18 So, the -- many times my colleague -- even  
19 cases for 2 or \$300 on, you know, exemptions on the  
20 property tax, my colleague has found things that should  
21 be corrected and it's especially those people that don't  
22 have the money to hire an attorney that need to be able  
23 to come before elected representatives.

24 So, I'm against this based on that.

25 MS. MANDEL: If I could -- since it's just this  
26 one point, we have a similar point, so you can deal with  
27 it all at once.

28 The same point, but adding on to that, even if



1 this were to go through this way, where it's an  
2 election, okay, one of the concerns would be whatever  
3 the Board sends out to these people who have a 15, 000  
4 or less personal income tax issue, it -- you know, we've  
5 had issues here and at FTB, I'm sure other agencies,  
6 how -- how does that document that we send out look to  
7 the taxpayer?

8           It's going to look to them like we're forcing  
9 them to waive their hearing. They might not understand  
10 that and I realize you have a safety valve, but it may  
11 look like we're forcing them to give up their hearing  
12 right by however the letter is phrased.

13           And it also has the potential -- now maybe  
14 you'd put the words here about a pro bono program and  
15 pro bono's available elsewhere, but for an unrepresented  
16 taxpayer it might look like, oh, in order to get some  
17 assistance that I can't afford to get it for free from a  
18 law clinic, I have to give up my right to a hearing.

19           And so, you know, even -- I have the same  
20 question Mr. Parrish does -- but even if the Board were  
21 to go forward with this elected provision, whatever gets  
22 sent out could really turn problematic.

23           And, you know, we -- we might all think that  
24 the letter looks perfectly innocent and obvious, and  
25 then we might start getting some phone calls from people  
26 who say we are forcing to people to give up their right  
27 to a hearing.

28           So --

1 MS. CAZADD: Those are -- those are certainly  
2 valid concerns. And we really appreciate that.

3 We certainly -- that's the last thing we would  
4 want to do is to prevent people or discourage them in  
5 any way from coming to the Board for a remedy for their  
6 concerns.

7 But I'd like Senior Tax Counsel Ian Foster and  
8 Brad Heller to address those questions as we do have a  
9 program in place.

10 MR. FOSTER: Right. And we actually are -- you  
11 know, these have been the concerns all long with the  
12 simplified briefing schedule. And we are drafting the  
13 regulations so that they require that the notice that  
14 goes out be clear on these exact points.

15 The notice, under the regulations, has to be  
16 clear that this is an election; that if you make the  
17 election, you waive your right to an oral hearing, but  
18 that there is no requirement that you make the election  
19 at all.

20 And that there will -- it will still come up as  
21 a nonappearance matter where the Board can then order an  
22 oral hearing, where anybody is entitled to speak at any  
23 nonappearance matter that's noticed on the agenda.

24 MS. MANDEL: I -- should it ultimately go into  
25 place, you know, thinking ahead, I have a suggestion  
26 that whatever the -- you know, we don't normally approve  
27 every single letter that goes out or every single form,  
28 but I have been involved -- maybe it was at FTB -- where

1 letters had gone out and then we got a lot of phone  
2 calls about the content of the letter and how people on  
3 the outside perceived it.

4 And that content might be something that,  
5 perhaps, you take to the Board so that the -- if this  
6 all goes through this way, so that the Board doesn't get  
7 blindsided by calls from people or their  
8 representatives.

9 MS. CAZADD: You're concerned that -- that  
10 anything we send out needs to be in very plain English,  
11 very clear to people so they understand --

12 MS. MANDEL: Yeah, I don't want any phone  
13 calls --

14 MS. CAZADD: -- that something's happening to  
15 their rights?

16 MS. MANDEL: -- saying we're threatening senior  
17 citizens.

18 MS. CAZADD: Yes.

19 MS. MANDEL: -- or anything, you know.

20 MS. CAZADD: Absolutely and that there should  
21 be a taxpayer education program that goes along with  
22 this so that we adequately communicate to people what is  
23 happening and what their options are.

24 I certainly agree with that wholeheartedly.

25 MR. HELLER: Miss Mandel, I think that staff --  
26 I mean, assuming that this procedure in concept was  
27 approved today, so that staff was directed to prepare  
28 actual regulatory language and present it to the Board

1 containing this type of procedure, we could also prepare  
2 sample language for the Board Proceedings Division and  
3 submit that to Board Members along with the proposed  
4 regulation, so you can see exactly what a taxpayer would  
5 receive in the mail and get your own feeling for really  
6 how they would view it and whether they would feel like  
7 they're being deprived of something or feel the need to  
8 call one of the Board Members and complain.

9 I think in addition to that, you know, we also,  
10 as our memo indicates, we wanted -- we do want to  
11 incorporate a procedure that would allow the Chief  
12 Counsel to revoke one of these elections where a  
13 taxpayer could establish that it was made in mistake.

14 So, if they can come forward and explain why  
15 they didn't understand it, the Chief Counsel would be  
16 able to go ahead and revoke that election and get them a  
17 hearing.

18 In addition, it's completely elective. And I  
19 think this goes to Mr. Parrish's concern, that there is  
20 no taxpayer who would be forced to use this procedure at  
21 all. It would only be a taxpayer who was contacted by  
22 Board Proceedings, informed that they could use it, if  
23 they so chose, and then went ahead and chose to use that  
24 procedure.

25 In addition, it does provide a small benefit in  
26 that, you know, it does cut down the cost associated  
27 with the appeal. And then it also does limit the  
28 responses by the Franchise Tax Board and. I am sure

1 there may be a few taxpayers who would feel like that  
2 was a pretty good benefit and worthy of a small  
3 exchange.

4 But I think beyond that too there is one  
5 additional issue is staff definitely does feel that it  
6 would be very beneficial to institute appeals  
7 conferences in cases that are going to the Board for an  
8 oral hearing.

9 And part of our overall concern in drafting  
10 Chapter 4 was to make sure that we took into account our  
11 current staffing, our current staff levels and, you  
12 know, our projections for additional staff in the  
13 future. And we were looking for a way to shift the --  
14 our staff's, you know, workload so that they would be  
15 available to do those additional appeals conferences for  
16 cases that are going to the Board for an oral hearing.

17 And this was one mechanism that we found to, at  
18 least, in some way not deprive a taxpayer of the same  
19 sort of reviews the staff always gives appeals, but to  
20 streamline that so there is less overall work, both at  
21 at the FTB and the Board of Equalization so that we can  
22 free up the resources for those appeals conferences.

23 MR. FOSTER: And the ultimate benefit to the  
24 taxpayer too is this is a much simpler, less  
25 intimidating process for those who are not represented  
26 whether by necessity or by choice.

27 MS. MANDEL: Right, as long as the letter is  
28 not intimidating itself.

1           MR. FOSTER: Correct. Yeah, and that's  
2 certainly something that we want to work on and make  
3 sure that the letter is acceptable.

4           And also ultimately because this process would  
5 be much faster than the normal process, there's going to  
6 be a lot less interest owed if the assessment is upheld.

7           If it's a refund, the State is going to owe a  
8 lot less interest on paying out the refund.

9           MS. MANDEL: Okay. Just -- I have a couple of  
10 other things on this one.

11           Just from reading some of the text, and, of  
12 course, it will depend on what the actual language is  
13 that comes forward in the regulatory process, I would  
14 again be concerned about whether there is too much  
15 dumped into the regulations that isn't really  
16 appropriate for the regulation, but again that sort of  
17 struck me in the last part in particular, talking about  
18 the process for rehearing. That was just where it sort  
19 of struck my brain. But that really depends on what  
20 your actual language turns out to be.

21           Under -- and again the same thing with the  
22 frivolous appeals penalty, it's going to really depend  
23 what the actual language is.

24           On the bit about the -- what's this, the  
25 preparation of concurring or dissenting opinions, again  
26 depending what your -- what your language is, of course,  
27 Board Members have legal staff and there's nothing to  
28 preclude, presumably, a Board Member from, you know,

1 drafting their own rather than telling Appeals to draft  
2 it, I assume that.

3 The major other substantive item that I have is  
4 on page 7 with respect to a hearing on a claim for  
5 refund where -- where the refund claim has to do with  
6 something for which there was a hearing on an underlying  
7 Notice of Proposed Assessment and you used the phrase,  
8 "res judicata."

9 And you cite the Code -- the Tax Code section  
10 about bringing a second claim. And I feel very strongly  
11 about this, we've had this in cases before the Board,  
12 this is not an issue of res judicata.

13 Res judicata would mean that the claim was  
14 completely barred and that the taxpayer would not --  
15 see, they're nodding -- that the taxpayer -- nodding up  
16 and down for yes -- that the taxpayer would not even be  
17 able to file the claim in the first place with the  
18 Franchise Tax Board.

19 We have had cases come back here on claims for  
20 refund where there are new facts and evidence and  
21 slightly different legal arguments, sometimes, even  
22 perhaps, the claim for refund in the tax process is a  
23 continuation of the same action as the original NPA.  
24 That's your basic process -- you got to do the NPA, you  
25 got to do a claim for refund if you want to get to  
26 court.

27 The Board could, in its discretion, if there  
28 is absolutely nothing new, say, "We hear you, but

1 there's absolutely nothing new."

2 But it's not -- it's not a -- res judicata is  
3 not a basis on which to deny them a claim -- a hearing  
4 on a claim for refund where they had a hearing on the  
5 underlying NPA if this is -- you know, if they keep  
6 trying to file a claim for refund for the same year on  
7 the same issue and the prior claim was denied and they  
8 lost their right to go to court and the statute has run,  
9 you can't file a second claim.

10 But it's not -- it's not an issue of res  
11 judicata. The cases that somebody had cited some years  
12 ago when we had this, when they said that res judicata  
13 barred a claim, that was because they were trying to  
14 rely on some federal tax cases where a taxpayer had lost  
15 in Tax Court and that Tax Court decision went final and  
16 the taxpayer then filed a claim for refund and tried to  
17 go to the federal District Court and the federal system  
18 is a different system. They had already been through  
19 the system for the entire year by going to Tax Court.

20 They could have taken that up and they did not  
21 and the Tax Court also now has the power to grant an  
22 overpayment. So, it's a different system.

23 And here the res judicata statute in the R & T  
24 Code has to do when the year is all said and done, it is  
25 over.

26 So, anyway --

27 MR. FOSTER: I could --

28 MS. MANDEL: -- that's my impassioned speech



1 for the day.

2 MR. FOSTER: -- address that to a certain  
3 degree.

4 The regulatory language that we're drafting  
5 does not use the phrase "res judicata" and does not cite  
6 the code section.

7 And the theory behind the language we're  
8 drafting is that we're talking about either refund  
9 claims or interest abatement claims, where everything is  
10 exactly the same as the prior thing. We're talking  
11 about the efficient use of administrative resources and  
12 whether the Board -- and this is what the Board will  
13 have to determine when the language comes up -- whether  
14 the Board wants to continually hear the same case over  
15 and over when nothing has changed, particularly in the  
16 interest abatement section and, perhaps, there needs to  
17 be legislative change, there is nothing to prevent  
18 someone from making the same interest abatement claim  
19 over and over and over without end -- without anything  
20 changing.

21 MS. MANDEL: Then I look forward to the actual  
22 language.

23 But at this point, I am a no on the way the  
24 thing's written up.

25 MR. PARRISH: Mr. Chairman, could we call the  
26 question?

27 MR. LEONARD: Mr. Chairman?

28 MR. PARRISH: Mr. Leonard has --

1           MR. CHIANG: Do you want me to call the  
2 question or not?

3           MR. PARRISH: Well, no, I -- out of respect for  
4 my fine colleague --

5           MR. LEONARD: Two and a half minutes.

6           MR. CHIANG: I just had to -- I just wanted to  
7 be --

8           MR. LEONARD: I wanted to associate myself with  
9 Miss Mandel's comments on the last two items.

10           I think we should make the amendment today. I  
11 understand the risk of a taxpayer repeating the same  
12 claim, but I don't think it should be automatically  
13 barred.

14           There -- there may be a new issue in there and  
15 I don't want it thrown out at the entry level because it  
16 looks the same.

17           And I don't -- I've seen this Board when they  
18 see the same taxpayer back again on a rehearing with no  
19 new stuff, there's not a lot of wasted time and effort,  
20 they're out. There is no rehearing.

21           So, I don't know what we're losing or gaining  
22 in efficiency.

23           I'll also associate with revoking a right to  
24 oral hearing. You guys don't have enough confidence in  
25 yourselves. If this thing works, we'll have less full  
26 Board hearings because taxpayers will be satisfied at  
27 the appeals level that a fair job was done -- whether  
28 they win or lose, the job was fair and the result of

1 that appeals conference reflects the Board's feelings.

2 But that -- but that -- take confidence in that  
3 and allow that taxpayer -- I mean, my problem is the  
4 election is made to revoke my right to a hearing when I  
5 file the petition of appeal. There could be something  
6 happening at the appeals conference that so dissatisfies  
7 me that I want to say it again in public to the Board of  
8 Equalization as my elected representatives. It may have  
9 something totally on point to the claim it may be  
10 something to the process itself, but I want to get that  
11 out. And you've have had me revoke my right months and  
12 months before for the -- for an advantage that I have,  
13 simplified briefing, less paperwork involved.

14 The same on the other side. And I recognize  
15 that and I do support that part, but I -- I have  
16 confidence yourselves, if this thing works, there won't  
17 be as many appeals that come to the Board.

18 And if it doesn't work, then there is no need  
19 to do the process at all. We're back to where we were  
20 before.

21 But to revoke that at that early stage is -- I  
22 don't know if we have the statutory authority to do  
23 that, to deny the taxpayer a right to an appeal.

24 MR. FOSTER: If I could clarify a few things  
25 here?

26 There are some relevant differences between the  
27 income tax appeals process and the business tax appeals  
28 process.

1           In business taxes the Appeals Division @@ hears  
2 the case and issues a decision. If a party is unhappy,  
3 they can then go to the Board.

4           In the income tax appeals process you choose  
5 either to go nonappearance and have a written decision  
6 of the Appeals Division or go to the Board.

7           So, the --

8           MR. LEONARD: You don't want to push me there.  
9 I am not real satisfied with our nonappearance process.

10           I think it's the same kind of letter  
11 Miss Mandel cited with the taxpayers being said, "If you  
12 do a nonappearance, the Board will give you full and --  
13 full weighted consideration as if you here making a  
14 personal plea and you have saved yourself the time and  
15 energy to go to Sacramento."

16           It's -- and I understand that the letter  
17 doesn't read that way to anybody else, but I think it  
18 does to a lot of taxpayers. And they give up their  
19 right to a hearing and find out later, as every one of  
20 these Board Members has pulled something off a  
21 nonappearance calendar for a full hearing because they  
22 caught something that they think the taxpayer should  
23 have stood up and said in public.

24           It's a -- don't push me on nonappearance. I  
25 want to go further in the other direction.

26           MS. YEE: Mr. Chairman.

27           MR. CHIANG: Have you concluded, Bill?

28           MR. LEONARD: I have concluded.

1 Thank you, Mr. Chairman.

2 MR. CHIANG: Thank you. Betty?

3 MS. YEE: I guess, given the concerns that have  
4 been articulated just now -- and I appreciate the work  
5 that's gone into this process up until this point -- I  
6 think my confidence level is now sufficiently not  
7 there to where I think I'd like to see some specific  
8 language before even doing a concept approval.

9 So, I am not prepared to do the concept  
10 approval today.

11 MS. CAZADD: We can certainly provide the Board  
12 with that and timewise, the end of June or July?

13 Whatever is the pleasure of the Board, we'll be  
14 happy to present that to you.

15 MR. FOSTER: It can be provided as soon as the  
16 Board wants it.

17 MS. YEE: Maybe at the next June Sacramento  
18 meeting?

19 MS. CAZADD: Certainly, absolutely, we'll do  
20 that.

21 MR. LEONARD: Thank you.

22 MR. DAVIS: Mr. Chairman, just to clarify, an  
23 issue raised by Miss Mandel and that was the -- we  
24 recognize the concern raised by Miss Mandel on the issue  
25 of res judicata. And that was raised in the interested  
26 parties meeting.

27 We took that in the memo as a short form place  
28 holder, if you will, and acknowledging it was

1 probably -- it was -- it was a short form incorrect  
2 place holder, but, nonetheless, to express a concept.

3 So -- but we understood what Board staff was  
4 trying to accomplish with it.

5 MS. MANDEL: So --

6 MR. DAVIS: But I think this raised a greater  
7 issue, which is also important.

8 MS. MANDEL: Yeah, but it's part of why on some  
9 things, concept; on some things, actual language.

10 MR. DAVIS: Yes.

11 MR. HELLER: Could I just ask a question,  
12 Mr. Chair?

13 MR. CHIANG: Certainly.

14 MR. HELLER: I just wanted to clarify as we  
15 prepare actual language to come back to the Board next  
16 month, we are being directed, essentially, to, I  
17 think -- I am not totally sure what we're directed to,  
18 but I think we do want to provide specific language for  
19 people if they were going to make this particular  
20 election so that we could see what that actually works  
21 like, and then we want to -- I think there seems to be  
22 no support and we do want to probably review something  
23 that would give staff some discretion to deny oral  
24 hearing to someone based on something that we might call  
25 res judicata or some other term essentially that that's  
26 probably not a procedure that we want to pursue going  
27 forward.

28 MR. CHIANG: Is anybody interested in that?

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MR. LEONARD: No.

MR. HELLER: We'll go ahead do that as I was suggesting.

MR. CHIANG: Any other requests?

Okay, is there a motion?

MR. LEONARD: Move the matter over to June.

MR. PARRISH: Second.

MR. CHIANG: Okay, motion by Leonard, second by Parrish.

Any objection?

Without objection, motion passes.

Thank you very much.

MS. CAZADD: Thank you.

MR. FOSTER: Then to clarify, the motion is to come back with regulatory language.

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REPORTER'S CERTIFICATE

State of California     )  
                                  )   ss  
County of Sacramento    )

I, JULI PRICE JACKSON Hearing Reporter for the  
California State Board of Equalization certify that on  
MAY 17, 2006 I recorded verbatim, in shorthand, to the  
best of my ability, the proceedings in the  
above-entitled hearing; that I transcribed the shorthand  
writing into typewriting; and that the preceding pages 1  
through 23 constitute a complete and accurate  
transcription of the shorthand writing.

Dated: June 2, 2006

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JULI PRICE JACKSON  
Hearing Reporter